In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1523

AMERICO MOSCA, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1962, petitioner was granted a patent for a chemical fungicide, which has not yet been made, used, sold or distributed within the United States. In order to market a pesticide within the United States, the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135-135k, requires that its labels be registered with the United States Department of Agriculture. Under the Food, Drug and Cosmetic Act, 21 U.S.C. 301-392 and accompanying regulations, 7 C.F.R. 363 *et seq.*, any pesticide chemical which is

not generally recognized by qualified experts as safe for sale when added to a raw agricultural commodity shall be deemed unsafe and therefore not entitled to registration, unless the pesticide is determined to be within an allowed tolerance or exempted by the Secretary of Health, Education and Welfare, 21 U.S.C. 346a(a); 7 C.F.R. 363.11. Further, the marketing of a fungicide requires a certificate of usefulness from the Secretary of Agriculture, the certificate to be issued after submission of detailed reports of the product's effectiveness. 21 U.S.C. 346a(a) and 346a(*l*).

In 1966, petitioner submitted an application for registration of his fungicide to the Department of Agriculture and requested a tolerance from the Department of Health, Education and Welfare. Both of petitioner's applications have been continually denied. In 1968, petitioner brought the present suit in the Court of Claims, arguing essentially that the issuance of a patent presumes the safety of the patented product, and thereby supercedes the above-mentioned statutes and regulations. Petitioner charged that the application of these regulations voided his patent and resulted in an unlawful taking of his property without just compensation. The Court of Claims rejected petitioner's contentions.

The Court of Claims correctly dismissed the suit. This Court has long recognized that "the franchise secured by a patent consists only in the right to exclude others from making, using, or vending the thing patented without the permission of the patentee." *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451, 463; *Special Equipment Co.* v.

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Coe, 324 U.S. 370, 378. The grant of a patent does not exempt the patentee from compliance with other laws or regulations. *United Shoe Machinery Corp.* v. *United States*, *supra*, at 463. The application to petitioner of the requirements governing the marketing of pesticides did not void his rights as a patentee, and there is no allegation of infringement through use by others.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1970.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

N° 1523

Americo Mosca, Petitioner

v.

The United States

On Petition for a writ of certiorari to the United States Court of Claims

PETITION FOR REHEARING THE ORDER DENYING THE WRIT OF CERTIORARI. JUNE 22, 1970

Under rule 58, I file the above mentioned petition for rehearing the order denying the writ of certiorari, because the case is of imperative public importance for the health and welfare of the present and future generations of the American People.

The public safety is the supreme Law.

The order was granted before this Court had received my brief answering the arguments raised in the memorandum for the United States in opposition. Since my brief explained that the memorandum in opposition is against the public health and welfare and includes many inexactitudes, I filed a motion to submit the "Petitioner's brief addressed to arguments raised in the memorandum for the United States in opposition".

I respectfully ask the Justices to examine attentively my brief to the memorandum in opposition, the writ and the entire record.

I

The case arose due to the fact that unable scientists in the Department of Agriculture intentionally ignored the Constitution, Treaties, Laws, the citizens' rights and the public health and welfare.

In the case, the substantial facts are:

1. The U.S. Department of Agriculture voided my U.S. Patent 3,048,516 in clear violation of Art. I, Sec. 8 of the Constitution, Art. 4, quater of the International Convention for the Protection of Industrial property, Patent Laws and violated the natural and Constitutional right of the American People to benefit of my scientific progress.

2. The U.S. Department of Agriculture destroyed my personal property in clear violation of the Fifth Amendment. The inviolability of the private property is the fundamental law of all civilized countries.

3. In conformity with the American doctrine and jurisprudence, just compensation is due to me for the destruction of my property by the Respondant, under the Municipal and Federal Law of the United States, as well as under the international law, based upon the respect for private property.

4. A patent is granted to make, use or sale an invention. This Court for about one hundred years declared: "It is the public interest which is dominant in the patent system". The illegal prohibition by the Department of Agriculture of the use of my patented fungicide in interstate commerce is against the public interest.

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5. My scientific discovery and my patented fungicide are an indestructible property, Patent right is granted only for limited time.
6. The Court of Claims recognized that in the case there was an improper application of regulations and that the regulations were not applied in the best interest of scientific progress.
7. The improper application of regulations resulted in the destruction of my personal property. Since a patent is an intangible and indestructible thing, the improper application of regulations that prohibited the use of my property is the illegal deprivation of the use of my property and "de facto" is an illegal seizure and detention of my property by the United States. In the case the appropriate remedy is the restitution of the property seized, plus indennity for damages resulting from the detention of the property, plus interest for deprivation of use of the property and plus expenses of recovering that I suffered.
8. My claim to recover damages is protected by Constitutional Guarantees, Treaties and Statutes.
9. In the case the scientific progress is dominant because my scientific discovery gives for the first time in the world the fundamental knowledge to ascertain the difference between safe and poisonous products, indispensable to solve the pollution problems; and the use of my patented fungicide will help to produce healthy, uncontaminated and aboundant crops and to solve the agricoltural pollution problem.

II

In my petition for writ of certiorari and in the record, I explained the fundamental deceit made for many years by the USDA and HEW officers as regards the efforts of Presidents Kennedy, Johnson, U.S. Senate in order to solve toxic pesticides, food additives, drugs etc. problems.

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Still today, the USDA Officers go on deceiving the U.S. Senate in order to perpetuate their prestige and privilege. On June 17, 1970.
The New York Times reported: "In a related action, the Agricultural Department's director of science and education, Dr. Ned D. Bayley, told members of the Senate Commerce Subcomittee on Energy, Natural Resourches and Environment that the current laws governing environmental chemicals were inadequate to protect public health. Dr. Bayley said many agricolture officials believed that an entirely new law might have be written to clear up discrepancies in the old statutes, mainly the Pesticide Act of 1964. Further legal power may be needed, Dr. Bayley testified, to stop the sale of products while administrative investigations are under way, to require new warnings on packages, to require quality control during manufacturing with increased inspections and to impose liability on the users of some chemicals. Senator Philip A. Hart, Democratic of Michingan the Subcommittee Chairman, said he believed that the current law was adequate but that the Department of Agriculture was interpreting it too litterally".
I agree with Senator Hart that the current law is adequate. In fact Congress enacted the 1964 Pesticide Act with the purpose of protecting public health from the use of toxic pesticides, and gave full powers to the USDA Secretary. Therefore after the first damages to the public health, USDA was bound to ban all toxic pesticides. USDA Officers on the contrary, in agreement with the pesticide industry made several scientific groundless regulations on precautions, tests etc. and damages increased year after year.
The chemical reactions that cause toxicity occour at the speed of about 186,000 miles a second i. e. at the speed of the light.

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In the conference at the USDA in Washington, on May 27, 1968, I explained the scientific problem of safety and toxicity to the Staff of the USDA, Agricultural Research Service, (Mr. Baylay was present) but USDA Officers ignore Atomic science, Chemistry Physics, mathematics and other exact sciences. Further legal power to require new warnings on packages, to require quality controls during manufacturing with increased inspection and to impose liability on the users will not solve the toxic pesticides problem. More than ever, this ancient statement of a Justice is valid today: "The power to regulate is the power to destroy". In the writ of certiorari, Conclusion page 64 A. 1, I reported the scientific solution of the toxic pesticides problem.

III

After many letters from my U.S. Representative Mr. M.A. Corbett to the Secretary of Interior and other departments, that the use of toxic gentic pesticides would cause an irreparable water pollution, on June 17, 1970, the Interior Secretary Walter J. Hickel imposed a virtual ban on the use of pesticides on more than 500 million acres of Federal Lands, one - quarter of the land area of the United States. Mr. Hickel's order was viewed by some Federal sources as serving to good other Federal Organizations managing large tracts of Governments land, such as the Departments of Defense and Agriculture into adopting stronger policies against the unrestricted use of toxic pesticides. The policy of the Department of Agriculture is a further violation of the Pesticide Act of 1964.

IV

In September 1968, the Department of Agriculture partecipated in a television program in which toxic

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pesticides were advertised as "SAFE", because these public hazards are approved by the Department of Agriculture. These advertisements are false because the safety of all chemicals is a natural law discovered by me in 1952. The scientific mathematic demonstration is in Record Exhibit No 3, Folio 24 " Efficacy and safety of my patented fungicide".
During 1969 and 1970 the Agriculture Department answered insistent public complaint by announcing that public money would be spent to find "less harmful" or "less persistent" pesticides. This is a mere dream. The efficacy and safety of all remedies depend on the "IONIZATION POTENTIAL" and the safety depends on the way in which the ionization occurs. For this and in order to solve the pollution problems, in May 1967, my U.S. Representative Mr. Corbett asked to the Agriculture Department the appointment of a Scientific Committee of qualified experts in Atomic Science, Chemistry Physics etc. but the Department of Agriculture refused it.
In the oral discussion in the Court of Claims, October 6, 1969, Judge Davies asked to Attorney Arsenau for respondant why USDA refused the appointment of a Scientific Committee. Attorney Arsenau answered that it was denied for the prestige of the American National Academy of Science. So a serious scientific examination of the only scientific solution to all the pollution problems was denied in the name of the prestige of other scientists.
In my writ of certiorari I explained at page 64, 65, Conclusion A. 1, 2, 3, the scientific impossibility to use chemicals of organic synthesis and radioisotopes.

V

The public safety is the supreme law. I respectfully ask the Justices to examine attentively the Graphs 3 and 4 (Record Exhibit 6b) that illustrate:

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(3) Increase in births of mentally retarded babies.
(4) Escalating costs of health care, occurring in the United States after 1952 i. e. after the wide use of compounds of organic synthesis as pesticides, food additives, drugs etc.

In 1957 by 5 years' rigorous practical tests and controls, I ascertained that the compounds of organic synthesis are TOXIC GENETICS i.e. THEY ALTER THE NATURAL CYCLE OF ALL LIVING BEINGS, and I warned USDA and HEW in order to avoid a disaster in the United States. The damages resulting from the use of toxic genetics in agriculture, food additives, medicines etc. are CUMULATIVE AND REPEAT FOR 40 GENERATIONS. Also in 1958 and in the following years I signalized the gravity of the problem many times.

If the USDA and HEW Officers in conformity of their mandate to administer the Pesticide and Food, Drug and Cosmetic Acts, i. e. to protect public health should have been honest and qualified experts in 1958 they should have stopped the market of all toxic genetics. The USDA and HEW Officers ignored my alarm.

Graph No 3 explains the increase in births of mentally retarded babies from 1952 to 1968.

In 1952 we had 20,000 births of mentally retarded babies.

In 1958 we had 80,000 births of mentally retarded babies.

In 1964 we had 126,000 births of mentally retarded babies.

In 1968 we had 550,000 births of mentally retarded babies.

This impressive increase demonstrates that in about 10 years the births of mentally retarded babies will surpass the births of normal babies.

This will bring the American People towards distru-

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ction. However the President, the Congress and the Supreme Court are in front of the most terrible problems of hystory, as NO FORCE IN THE WORLD CAN STOP THE CHEMICAL REACTIONS THAT ALTER THE NATURAL CYCLE OF THE LIVING BEINGS.

Graph No 4 explains the escalating costs of health care and this is also the direct consequence of the use of toxic genetics in agriculture, foods, medicines etc. In 1929 we had costs of 4 billion dollars and a population of 120 million, i. e. 33 dollars yearly for citizen.

In 1949 we had costs of 10 billion dollars and a population of 148 million, i. e. 68 dollars yearly for citizen.

In 1964 we had costs of 40 billion dollars and a population of 182 million i. e. 220 dollars yearly for citizen.

In 1965 we had costs of 50 billion dollars and a population of 184 million i. e. 271 dollars yearly for citizen.

In 1968 Senator Ribicoff predicted that in 1975 the escalating costs of health care should surpass 100 billion dollars yearly. (In record Exhibit No 6 , I explained the scientific cause of the alteration of the natural cycle of life).

NO NATION CAN SURVIVE IN THESE CONDITIONS.

VI

"The prosperity and the very existence of the Union are vested in the hands of the Justices of the Supreme Court. Without them the Constitution would be a dead letter.

..... Their power is enormous, but it is the power of public opinion". (Alexis de Tocqueville "Democracy in America" 1815).

Justice Frankfurter said in Law and Politics (1935)

that: "Most of problems of modern society, whether of industry, agriculture or finance, of racial interactions or the eternal conflict between liberty and authority become in the United States sooner or later legal problems for ultimate solution by the Supreme Court".

Today the very survival of the American People is in the hands of the Justices against the assaults of scientists or "New Bramins" of the executive who have an absolute power. In my case in particular the Supreme Court defends the Constitution, Treaties, Laws, the Legislative power, the scientific progress and the public safety against the assaults of scientists of the executive power. In my case the power of the Justices can prevent the destruction of the American People, as urged by more than 100 million of Americans in April 1970 in the "Earth Day" demonstration protest for urgent solution of pollution problems.

Since 1962 the public opinion urged the ban of toxic pesticides but the USDA Officers fraundulently deceived the American People.

On June 17, 1970 a spokesman said that the Interior Department had previously banned some of the chemicals, but the prohibitions were widely ignored by the USDA's 75,000 employes. (New York Times).

The Report "USE OF PESTICIDES" (2963) of President Kennedy's Science Advisory Committee, recommended "ELIMINATION OF THE USE OF PERSISTENT TOXIC PESTICIDES SHOULD BE THE GOAL".

In oder to solve these serious problems on July 17, 1967 I sent to HEW and USDA a list of toxic persistent pesticides (Record Exhibit No 3, Folio 11).

In my list I reported the chemical name and not commercial names, from the "Farm Chemicals Handbook" 1963. In my petition for writ of certiorari pa-

ge 64 A. 1, 2, 3, I explained the scientific impossibility to use toxic genetic chemicals.

Notwithstanding the negligence of the USDA officers, urgent drastic measures to ban all the toxic genetic chemicals are indispensable and cannot be delayed as "SALUS POPULI SUPREMA LEX" or 'THE PUBLIC SAFETY IS THE SUPREME LAW" as the ancient Roman Law said.

In this petition I have recorded some facts not available at the time of my last filing such as the "Earth Day" Demonstration, the ban of toxic pesticides by the Interior Secretary and the intervention of the Subcommittee of the U.S. Senate.

The power of the Justices can prevent a denial to the people of their Constitutional right to produce healty and aboundant crops, to eat uncontaminated and very good foods and to enjoy an unpolluted environment.

Therefore I respectfully ask the Justices to order the restitution of my property, and to order to the Secretaries of the USDA and HEW the registration of "CM" SAFE AND EFFICIENT ALUMINUM IONS FUNGICIDE U.S. Patent 3,048,516, that was DENIED FOR IMPROPER APPLICATION OF ACTS AND REGULATIONS.

I respectfully ask the Justices to order just compensation for damages resulting from the improper application of Acts and Regulations, as the illegal prohibition of the use of my patented fungicide by the Department of Agriculture deprived me of the use of the property.

The Justices will thus prevent that a cruel injustice be the reward of an individual scientist, and the destruction of 20 years of his labor in the service of humanity.

Respectfully submitted

Americo Mosca
Doctor in Chemistry

July 6, 1970

Americo Mosca